No. 77-1193

In the Supreme Court of the United States

OCTOBER TERM, 1977

MICHAEL R. STEARSMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The unpublished opinion of the Court of Claims (Pet. App. 1a-4a) is noted at 566 F.2d 1192.

JURISDICTION

The judgment of the Court of Claims was entered on November 25, 1977. The petition for a writ of certiorari was filed on February 22, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTIONS PRESENTED

1. Whether the commission of adultery by a staff sergeant with the wife of, and in the house of, another serviceman, constitutes a "service connected" offense.

2. Assuming petitioner's offense is not "service-connected" under *O'Callahan* v. *Parker*, 395 U.S. 258, whether *O'Callahan* should be applied retroactively.

STATUTE INVOLVED

Article 134, Uniform Code of Military Justice, 10 U.S.C. 934, provides:

> Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

STATEMENT

Petitioner is a non-commissioned officer with the Air Force, and has been continuously in that service since 1956. In early 1963 he was a Staff Sergeant stationed at an Air Force Base in Alaska. He was convicted in 1963 by court-martial under Article

134 of the Uniform Code of Military Justice (UCMS). That provision proscribes "all disorders and neglects to the prejudice of good order and discipline in the armed forces, [and] all conduct of a nature to bring discredit upon the armed forces * * *." 10 U.S.C. 934. The particular charge was that petitioner had engaged in sexual intercourse with the wife of another Air Force sergeant stationed at the base, in the house of the other sergeant, which was located off-base (Pet. App. 1a-2a).[1]

The court-martial record shows that petitioner and his partner committed the adulterous act in the other sergeant's house, while the latter was sleeping on a nearby couch. Afterwards, the wronged husband apparently awakened and overheard the adulterous pair conversing. The two sergeants worked at the same base and were apparently in frequent contact (Pet. App. 4a n.1).

As a result of the court-martial conviction, petitioner was stripped of his sergeant's rank, reduced to the rank of airman basic, confined for approximately five and a half months, and compelled to forfeit approximately two and a half months' pay and allowances (Pet. App. 2a). After petitioner's release from confinement and return to duty in late

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[1] Petitioner was also convicted by the same court-martial under Article 130, UCMJ, of unlawfully entering another's house (in January 1963) with intent to commit a criminal offense, *viz.* adultery with another married woman. However, this conviction was set aside on procedural grounds by the military review authority.

1963, however, he again rose through the ranks and is presently a Master Sergeant.[2]

Some six years later, after the decision of this Court in *O'Callahan* v. *Parker*, 395 U.S. 258, petitioner sought to have his 1963 conviction nullified on the ground that his offense was not "service connected" under the *O'Callahan* ruling. This request was denied by the Air Force. Petitioner filed this suit in the Court of Claims in May 1975, asserting that the offense for which he was convicted in 1963 was not service connected, and that *O'Callahan* should be applied retroactively to void that conviction. Petitioner sought back pay amounting to approximately $30,000,[3] and moved for summary judgment (Pet. App. 2a).

In January 1975, before petitioner filed this lawsuit, the Court of Claims had already ruled that *O'Callahan* was not retroactive, following the plurality opinion of this Court in *Gosa* v. *Mayden*, 413 U.S. 665. See *Augenblick* v. *United States*, 206 Ct. Cl. 74, 509 F.2d 1157, 1159-1160, certiorari denied, 422 U.S. 1007. In 1976 the Court of Claims adhered to this view in *Gross* v. *United States*, 209 Ct. Cl. 70, 79-80, 531 F.2d 482, 488.

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[2] The 1963 court-martial conviction also ordered a bad conduct discharge. However, the Air Force administratively remitted this penalty in 1964, permitting petitioner to continue in service, and to reenlist.

[3] This sum allegedly represents what petitioner would additionally have earned if he had not temporarily lost rank as a result of his conviction.

In view of the fact that the non-retroactivity of *O'Callahan* was plainly settled in the Court of Claims, the government cross-moved for summary judgment in petitioner's lawsuit, arguing only the non-retroactivity of *O'Callahan*. The government made no separate argument that petitioner's offense was in fact "service connected," but no concession was made that the offense was not "service connected."[4]

In a decision issued on November 25, 1977, the Court of Claims granted the government's motion for summary judgment. The court ruled (Pet. App. 2a-3a):

> Plaintiff's first point is that the court-martial was without jurisdiction because the off-the-base offense involving a civilian dependent of a serviceman was not service-connected, and therefore under *O'Callahan* v. *Parker*, 395 U.S. 258 (1969), could not have been tried by court-martial in 1963. This court has already rejected comparable arguments in *Augenblick* v. *United States*, 206 Ct. Cl. 74, 509 F.2d 1157 (1975), *cert. denied*, 422 U.S. 1007 (1976), and *Gross* v. *United States*, 209 Ct. Cl. 70, 79-80, 531 F.2d 482, 488 (1976), and we see no significant differences here.[5]

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[4] For purposes of its argument on non-retroactivity of *O'Callahan* the government "assume[d] arguendo" that petitioner's offense was not service connected (Defendant's Cross-Motion for Summary Judgment, p. 8 n. 5).

[5] The Court of Claims also rejected petitioner's separate argument that the 1963 conviction violated his constitutional right of privacy (Pet. App. 3a-4a). Petitioner does not seek further review of this ruling (Pet. 7).

ARGUMENT

The decision of the Court of Claims is consistent with the ruling of this Court in *Gosa* v. *Mayden*, 413 U.S. 665, and with final rulings of the Court of Military Appeals and every court of appeals that has decided the question of retroactivity of *O'Callahan*. There is no present conflict among the lower federal courts on *O'Callahan's* retroactivity; hence there is no occasion for further review of that question by the Court at this time. Nor does this case present any basis for an "exception" to the rule of non-retroactivity of *O'Callahan*.

1. Preliminarily, it should be pointed out that there is a substantial argument that, in the particular circumstances of this case, the offense for which petitioner was convicted was indeed "service connected."

Petitioner points to cases where the Court of Military Appeals has ruled that sex offenses by servicemen occurring off-base, even where involving the dependent of another serviceman, are not service connected under *O'Callahan*. See *United States* v. *McGonigal*, 19 U.S.C.M.A. 94, 41 C.M.R. 94; *United States* v. *Henderson*, 18 U.S.C.M.A. 601, 40 C.M.R. 313; *United States* v. *Shockley*, 18 U.S.C.M.A. 610, 40 C.M.R. 322. See Pet. 8 n. 4. But they are distinguishable. Those cases each involved serious civilian crimes committed off-base (statutory rape of a minor, sodomy between a serviceman and his stepson, and sexual acts with a child). The civilian authorities

have an obvious and important interest in prosecuting serious civilian offenses of this nature, have "traditionally prosecuted" such crimes, and undoubtedly will continue to do so. See *Relford* v. *Commandant*, 401 U.S. 355, 365. We agree that such prosecutions should be in the civilian courts, and that the normal rules of criminal procedure (including trial by jury) should apply.[6]

In the present case, on the other hand, the offense for which petitioner was convicted (adultery) hardly amounts to a "serious crime" under civilian law.[7] As petitioner observes, such an "offense" would probably not have been prosecuted at all by the State of Alaska (Pet. 15). Indeed, the military itself would probably not wish to prosecute in a case where a serviceman commits adultery with a woman having no connection with the service, and there is no adverse effect on the service. However, *this* case involves the commission of adultery with the wife of *another serviceman* attached to the same military base as the petitioner, and, moreover, in the other serviceman's own house, while he was present. In these unusual

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[6] See the concurring opinion of Judge Nichols in *Augenblick* v. *United States*, 206 Ct. Cl. 74, 509 F.2d 1157, 1163 ("[the military] interest in deterring [a serious offense by a soldier against a civilian] and [the military] interest in trying it are two different things").

[7] Cf. *United States* v. *Sharkey*, 19 U.S.C.M.A. 26, 41 C.M.R. 26 (*O'Callahan* doctrine does not deprive military courts of jurisdiction to try offenses that would be dealt with as petty offenses in the civilian world, not requiring jury trial).

circumstances, the incident had a greater impact upon military than civilian interests. It was an offense affecting the military order, morale and working relationship of the two soldiers involved (and their military associates who knew of the offense). Both soldiers were attached to the same military base and were part of the same "military community." In these circumstances, petitioner's conduct was, we submit, appropriately dealt with as a violation of Article 134, which embraces "all disorders and neglects to the prejudice of good order and discipline in the armed forces, [and] all conduct of a nature to bring discredit upon the armed forces * * *." *Parker* v. *Levy*, 417 U.S. 733, 756; *Orloff* v. *Willoughby*, 345 U.S. 83, 94.[8]

2. Assuming arguendo that petitioner's offense was not "service connected," and could not today be punished by military courts-martial, the question arises whether *O'Callahan* should be applied retroactively. We adhere to the negative answer that we submitted in *Gosa* v. *Mayden*, 413 U.S. 665. In light of the full opinions by members of the Court in that case, it is unnecessary to repeat the arguments here.

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[8] "For the reasons which differentiate military society from civilian society, we think Congress is permitted to legislate with greater breadth and with greater flexibility when prescribing the rules by which the former shall be governed than it is when prescribing rules for the latter." *Parker* v. *Levy*, *supra*, 417 U.S. at 756.

"The military constitutes a specialized community governed by a separate discipline from that of the civilian." *Orloff* v. *Willoughby*, *supra*, 345 U.S. at 94.

We stress that the lower federal courts are, at this time, in accord in holding that *O'Callahan* is not applicable to earlier courts-martial. See *Gosa* v. *Mayden*, 450 F.2d 753, 758 (C.A. 5), affirmed, 413 U.S. 665; *Hooper* v. *Laird*, 482 F.2d 784 (C.A. D.C.); *Lichtenstein* v. *Schlesinger*, 495 F.2d 1382 (C.A. 9); *Schlomann* v. *Moseley*, 457 F.2d 1223, 1226-1228 (C.A. 10), certiorari denied, 413 U.S. 919; *Augenblick* v. *United States*, 206 Ct. Cl. 74, 509 F.2d 1157, certiorari denied, 422 U.S. 1007; *Mercer* v. *Dillon*, 19 U.S. C.M.A. 264, 41 C.M.R. 264.[9] And we submit that until such time as a conflict of decisions should arise, this Court may appropriately forego considering the problem once again.

We do not appreciate the force of petitioner's argument that *O'Callahan* should be retroactive at least for those servicemen still in the service (Pet. 12-14). It seems to us that a serviceman who was in fact discharged as a result of a pre-*O'Callahan* court-martial—generally entailing a "bad conduct" or "dishoncrable" discharge—arguably has a greater, not a lesser, interest in retroactive application of *O'Callahan* than a soldier who, as here, was court-martialled but never discharged. Nor is it obvious why those who happen to be still in the service should receive

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[9] The contrary decision in *United States ex rel. Flemings* v. *Chafee*, 458 F.2d 544 (C.A. 2), was reversed *sub nom. Gosa* v. *Mayden*, 413 U.S. 665, on alternative grounds on nonretroactivity (4 justices) and service connection of the offense (3 justices). In *Williams* v. *Froehlke*, 490 F.2d 998, 1000-1001, the Second Circuit considered *Flemings* no longer controlling in that circuit on *O'Callahan* retroactivity.

more favorable treatment than those similarly situated who have meanwhile voluntarily decided to separate or retire. The fact that petitioner stayed in the service and is now at a relatively high level in the enlisted ranks demonstrates that his former conviction no longer has any adverse "impact upon * * * petitioner in his *present* military service" (Pet. 13).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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